No. 94-982 (3)

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In The

Supreme Court of the United States

October Term, 1994

JOHN O'NEILL and SAMUEL R. GOODMAN, on behalf of themselves and all others similarly situated,

Petitioners,

vs.

CITY OF PHILADELPHIA, PHILADELPHIA PARKING AUTHORITY, OFFICE OF DIRECTOR OF FINANCE, BUREAU OF ADMINISTRATIVE ADJUDICATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

AMICUS CURIAE BRIEF OF THE CITY OF HENDERSON, NEVADA, IN SUPPORT OF RESPONDENTS

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994
NO. 94-982

JOHN O'NEILL AND SAMUEL R. GOODMAN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

PETITIONERS,

v.

CITY OF PHILADELPHIA, PHILADELPHIA PARKING AUTHORITY, OFFICE OF DIRECTOR OF FINANCE, BUREAU OF ADMINISTRATIVE ADJUDICATION,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

AMICUS CURIAE BRIEF OF THE CITY OF HENDERSON, NEVADA, IN SUPPORT OF RESPONDENTS

Pursuant to United States Supreme Court Rules 37.2 and 37.5, the City Attorney of Henderson, Nevada files this amicus curiae brief on behalf of the City of Henderson, State of Nevada in support of Respondents City

of Philadelphia, Philadelphia Parking Authority, Office of the Director of Finances, and Bureau of Administrative Adjudication in O'Neill and Goodman et al., Petitioners vs. City of Philadelphia et al., Respondents. Case No. 94-982 (hereinafter referred to as O'Neill/Goodman Petition in 94-982).

INTEREST OF AMICUS CURIAE CITY OF HENDERSON, NEVADA

On October 11, 1994, Amicus Curiae City of Henderson, Nevada, et al. (hereinafter referred to as "Amicus Henderson, Nevada") filed a petition for writ of certiorari entitled City of Henderson, Nevada et al. v. Nevada Entertainment Industries Inc. et al., Case No. 94-662, (hereinafter referred to as Henderson, Nevada Petition in 94-662) which raises the same question which has been raised in the O'Neill/Goodman Petition in 94-982; i.e. the correct meaning of the Huffman Abstention Doctrine expressed by this Court in Huffman v. Pursue Ltd., 420 U.S. 592 (1975) (which is radically different from that of other Abstention Doctrines). The Henderson,

Nevada Petition in 94-662 is presently before this Court on a Petition for Rehearing, filed on Feb. 3, 1995, (See copy at Appendix 1[1/] to this Amicus Curiae Brief) after this Court order, dated January 9, 1995, denying review.

The West Co. volume reporting the O'Neill case, 32 F3d 785 (Aug. 5, 1994), was received by mail in late November 1994. The facts and issues in the O'Neill/Goodman Petition in 94-982 were perceived by Counsel of Record to be so apposite to the Henderson, Nevada Petition in 94-662, that the City of Henderson filed a "Petitioners' Supplemental Brief" on December 14, 1994, (See copy at Appendix 2[2/] to this Amicus Brief) setting forth the importance of the O'Neill case and other recent abstention decisions:

Aiona v. The Judiciary of the State of Hawaii, 17 F.3d 1994 (CA 9, 1994), Benavidez v. Eu, 34 F.3d 825 (1994), Dubinka v. Judges of the Superior Court, 23 F.3d 222

1/ Less Appendix A, B, C, and D of the Petition for Rehearing.

2/ Less Appendix A of the Supplemental Brief.

(CA 9, 1994), Federal Express Corp. v. Tennessee Public Service Commission, et al., 693 F.Supp. 598 (M.D. Tenn 1988), Federal Express Corp. v. Tennessee Public Service Commission, et al., 878 F.2d 381 (CA 6, 1989), Federal Express Corp. v. Tennessee Public Service Commission, et al., 878 F.2d 1483 (CA 6, 1989), Federal Express Corp. v. Tennessee Public Service Commission, et al., 738 F.Supp. 1140 (M.D. Tenn., 1990), Federal Express Corp. v. Tennessee Public Service Commission, et al., 925 F.2d 962 (CA 6, 1991), and Members of Cal. Democratic Cong. Delegation v. Eu, 790 F.Supp. 925 (N.D.Cal. 1992). In its Supplemental Brief, Henderson, Nevada made two requests: (1) that this Court consider the merits of both the O'Neill/Goodman and Henderson petitions at the same Conference (see page 14); and (2) grant the petitions for writ of certiorari in O'Neill/Goodman No. 94-982, and in the Henderson Petition in 94-662, and set both cases for argument in tandem, on the questions raised in both of those cases, together with those raised by the

Respondents Nevada Entertainment Industries, Inc.'s separate petition for a writ of certiorari in Nevada Entertainment Industries, Inc. et. al. v. City of Henderson et al. 94-786 (See copy of Petitioner's Supplemental Brief in 94-662 at Appendix 2, pages 14 and 20).

Amicus Henderson, Nevada also transmitted copies of the four petitions filed in this Court in Nos. 90-1771, 92-643, 93-1969 and 94-662 to California Attorney General Daniel Lungren, who has recently been involved as a defendant in a number of important cases involving the Abstention Doctrine, such as: Benavidez v. Eu, 34 F3d 825 (CA 9, 1994); and Member of the California Democratic Congressional Delegation v. Eu, 790 F.Supp. 925 (N.D. Cal. 1992). In this regard, see the recent action taken by the California Attorney General, as reported in the Los Angeles Times News Articles for January 29, January 31 and February 4, 1995 at Appendix 2 to this Amicus Curiae Brief at pages H-1 thru H-3 and Appendix 3 to this Amicus Curiae Brief.

On January 4, 1995, Counsel of Record telephoned the Clerk's Office of the U.S. Supreme Court to ascertain the status of the Henderson, Nevada Petition in 94-662 and the O'Neill and Goodman Petition in 94-982 and was informed by a Clerk that the Henderson, Nevada Petition in 94-662 was on this Court's January 6, 1994 "Conference" calendar and the O'Neill and Goodman Petition in 94-982 was on the January 13, 1994 "Conference" calendar for disposition, but was being pulled that date (January 4,) and a response was being requested from the Respondent City of Philadelphia; et al. Amicus Henderson, Nevada, therefore, was taken back and extremely disappointed to learn on January 9, 1995 that this Court, having required a response from the City of Philadelphia on January 4, 1995, did not also continue to carry the Henderson Petition on its docket, as has been its practice in the past, see Supreme Court Practice, 7th Ed., by Stern, Gressman, Shapiro and Geller, at Section 4.16, "Important Similar Issues Already Pending

Before the Supreme Court" at pp. 192-193, and did not avail itself of the opportunity to consider both cases on the same conference calendar, as requested by Henderson, Nevada in its Supplementary Brief at pp. 14 and 20 in 94-662, (See copy at Appendix 2 to this Amicus Curiae Brief) but instead summarily denied the Henderson, Nevada Petition in 94-662 on January 9th.

The City of Henderson filed a Petition for Rehearing on February 3, 1995, in which it has asked this Court to reconsider its January 9, 1995 ruling in the light of this Court's constitutional duty (as a part of its appellate jurisdiction) to make constitutional judgments as to the Eleventh Amendment challenge asserted in case 94-662 which has never been considered by this Court. In this Brief, Amicus Curiae Henderson, Nevada requests this Court to make the same constitutional judgment in relation to No. 94-662, in the light of the amicus arguments herein. See Summary of Argument infra at p. 18 et. seq.

STATEMENT OF THE (O'NEILL/GOODMAN) CASE

The Philadelphia Traffic Court had exclusive jurisdiction over all summary offenses (42 Pa. C.S. section 1321) arising under Title 75 (Motor Vehicles) and under the Philadelphia Code, Title 12, enacted pursuant thereto, including parking violations.

The Pennsylvania Statute of Limitations barred the City of Philadephia from taking any action to enforce these summary offenses two years after the issuance of the summons (42 Pa. C.S. section 5333(e)).

(A) THE NEWLY ENACTED, COMPREHENSIVE PHILADELPHIA ORDINANCE ON PARKING VIOLATIONS PURSUANT TO STATE ENABLING STATUTE.

The traffic summonses which are the subject of this lawsuit were issued to Petitioners prior to June 1, 1989 and subject to the above provisions of law.

Pursuant to state enabling legislation, the Philadelphia City Council enacted a new comprehensive Ordinance.

amending Title 12 of the Philadelphia Code, entitled "Administrative Adjudication of Parking Violations", effective June 1, 1989 (City Code Sections 12-2800 et seq.).

It was the purpose of this new Code to reform the collection procedures of traffic tickets in Philadelphia by decriminalizing the process and creating a civil system. In particular, under the former Philadelphia Traffic Code, a defendant was required to be present in court before a disposition could be made of the case. The City was also barred from taking any action to enforce a summons two years after its issuance.

Under the new Administrative Code a summons unanswered within fifteen days of issuance is declared in default, a fine and penalty are assessed, and recorded as a debt due and owing to the City of Philadelphia subject to collection.

The Ordinance established a Bureau of Administrative Adjudication ("BAA"),

presided over by a hearing examiner. The BAA had no powers to summon an offender or enforce its adjudication. A person could appear before it on a strictly voluntary basis if he so wished to contest the debt which had been established.

The Philadelphia City Council did not transfer the jurisdiction over traffic tickets issued out of the Philadelphia Traffic Court prior to June 1, 1989. Rather, it provided that the holders of such tickets could elect to have their tickets adjudicated before the BAA, only if they gave their consent to its jurisdiction(section 12-2807(8), Brief, p.2).

However, the Deputy Director of Finance, a member of the executive branch of the City government without authority to do so, transferred all traffic tickets issued out of the Philadelphia Traffic Court prior to June 1, 1989 into the jurisdiction of the BAA. Thus, all tickets then existing and unadjudicated

within the exclusive jurisdiction of the Philadelphia Traffic Court had been transposed into a mature debt due and owing by the ticketholder to the City of Philadelphia in express violation of the Philadelphia Ordinances.

The BAA thereafter sent notice to each of the more than two million such ticketholders that they could elect to proceed either before the Philadelphia Traffic Court or the BAA. However, it did not inform them that their failure to proceed in the Traffic Court would constitute an irrevocable consent to the jurisdiction of the BAA.

Petitioners Goodman and O'Neill were among the aforesaid two million ticketholders who had not responded to a summons or other notices, to traffic tickets: Goodman traffic tickets: May 16, 1989, December 7, 1988, December 11, 1987, December 11, 1987 and February 26, 1987; O'Neill traffic tickets: May 1, 1989, October 10, 1988 and November 28,

1987, nor had they responded to the notice of the BAA of their right to elect the Traffic Court or BAA jurisdiction as set forth above.

(B) GOODMAN'S VOLUNTARY APPEARANCE BEFORE BAA.

On March 4, 1991 Goodman requested the BAA to schedule a hearing with connection with a parking ticket issued subsequent to June 1, 1989 within its jurisdiction. The BAA notified Goodman that it would list all tickets issued after June 1, 1989. When Goodman voluntarily appeared at the hearing, the hearing examiner then notified Goodman that he had listed an additional five tickets which had issued out of the Philadelphia Traffic Court prior to June 1, 1989.

(C) GOODMAN'S OBJECTION ON BASIS OF "LACK OF JURISDICTION" ARE OVERRULED; QUASI-JUDICAL ASSESSMENT OF FINES OF $173.00 AND $74.10.

Goodman, through counsel, objected on the basis of lack of jurisdiction and that the City was time-barred from taking any

action on those tickets by the Statute of Limitations. These objections were overruled. Goodman was assessed fines and penalties of $173.00 on the Philadelphia Traffic Court tickets, and $74.10 for the BAA tickets. Goodman has paid these amounts.

(D) O'NEILL VOLUNTARY APPEARANCE BEFORE BAA AND OBJECTION ON BASIS OF "LACK OF JURISDICTION" ARE OVERRULED; QUASI-JUDICIAL ASSESSMENT OF A FINE OF $45.00.

In April, 1991 O'Neill voluntarily contacted the Philadelphia Traffic Court to list three outstanding tickets issuing out of that court. O'Neill was then informed by the Traffic Court that they no longer listed parking violation cases. O'Neill then requested a hearing before the BAA. At the hearing, O'Neill objected to the jurisdiction of the BAA, which the hearing examiner denied and imposed fines and penalties in the reduced amount of $45.

(E) NEITHER GOODMAN NOR O'NEILL TOOK AN APPEAL FROM THE HEARING EXAMINER'S DECISION TO THE PARKING APPEALS

PANEL. BY ORDINANCE THE DECISION (AS A FINAL ORDER) COULD BE TAKEN TO THE PHILADLEPHIA COURT OF COMMON PLEAS.

Neither Goodman nor O'Neill took an appeal from the hearing examiner's decision to the Parking Appeals Panel and as provided by the Ordinance, the decision became a final Order from which an appeal to the Philadelphia Court of Common Pleas could then be taken. Neither Goodman nor O'Neill took an appeal to that court.

(F) THE FEDERAL CIVIL RIGHTS LITIGATION.

On October 30, 1991 O'Neill and Goodman filed a five count Complaint in the Federal Court for the Eastern District of Pennsylvania, and subsequently amending it to include a claim pursuant to 42 U.S.C. Section 1983. Jurisdiction was based upon 28 U.S.C. Sections 1331 and 1343(3) and (4). It alleged the City of Philadelphia, acting under color of law, had violated their Fourteenth Amendment due process rights depriving them of property. On October 15, 1992

Petitioners' Motion for Class Certification was denied, but the court agreed to proceed on the basis of a constitutional test case for all persons similarly situated.

(G) THE U.S. DISTRICT COURT REFUSED TO ABSTAIN AND GRANTS THE PETITIONERS' MOTION ON COUNT 2 FOR SUMMARY JUDGMENT.

On Cross Motions for Summary Judgment the District Court granted (March 29, 1993) the City's Motion with respect to Counts one, three, four and five, but declined the City's invitation to abstain under the Younger doctrine. The court granted Petitioners' Motion on Count two, holding that the City's defective notice to Petitioners had deprived them, without their consent or knowledge, of a Traffic Court proceeding in which the Statute of Limitations defense was available.

(H) THE U.S. DISTRICT COURT AWARDS DAMAGES IN THE AMOUNT OF $173.00 IN FAVOR OF GOODMAN AND ORDERED THE CITY TO VACATE ITS STATE JUDGMENT OF $45.00 AGAINST O'NEILL, IN DIRECT VIOLATION OF THE ELEVENTH AMENDMENT AND THE 1792 ANTI-INJUNCTION STATUTE 28 U.S.C. SECTION 2283.

Judgment was entered in favor of Goodman in the amount of $173 and the City was directed to vacate its outstanding $45 judgment against O'Neill. Because the City would be faced with a heavy financial burden concerning the potential claims of 2,713,975 persons similarly situated with regard to undisposed parking tickets issuing out of the Philadelphia Traffic Court, this portion of the Order as to supplemental relief was stayed pending appeal.

(I) THE CITY'S APPEAL.

The City filed a Notice of Appeal on April 20, 1993 from the judgment in the Federal District Court. Petitioners filed a cross appeal which was subsequently withdrawn. Jurisdiction was based upon 28 U.S.C. Section 1291.

(J) THE COURT OF APPEALS, SUI SPONTE, APPLIED THE HUFFMAN ABSTENTION DOCTRINE, BASED UPON "ABUSE OF DISCRETION" "IN DEFERENCE TO THE OVERWHELMING INTEREST OF THE CITY OF PHILADELPHIA AND THE STATE OF PENNSYLVANIA WITH RESPECT TO THEIR ON-STREET PARKING REGULATIONS" AND

REMANDED THE CASE WITH INSTRUCTIONS TO DISMISS.

Neither the statement of issues, the briefs, nor the oral argument of the City raised the issue of federal abstention in any of its forms. Panel member Senior Judge Garth raised the issue at the commencement of the City's presentation, to the exclusion of all other issues as briefed by both parties.

The Third Circuit Court of Appeals Judges Garth and Roth filed a majority Opinion August 5, 1994, holding that the District Court abused its discretion in failing to abstain from hearing O'Neill and Goodman's federal claims in deference to the overwhelming interest of the City of Philadelphia and the State of Pennsylvania with respect to their on-street parking regulations and remanded the case to the District Court with instructions to abstain under the Younger-Huffman Abstention Doctrine and to dismiss the plaintiff's complaint. A

dissent was filed by Judge Lewis, in which he factually distinguished this case from this Court's decision in Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986).

SUMMARY OF ARGUMENT

The judgment of the Court of Appeals for the Third Circuit is proper and should be affirmed, but the reasoning is erroneous and should be reexamined by this Court and corrected. This Court's decision in Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) is controlling in the O'Neill/Goodman Petition in 94-982 and in the Henderson Petition in 94-662 and requires that both the O'Neill/Goodman and Nevada Entertainment Industries Inc.'s Civil Rights Actions be remanded to the District Court with instructions to abstain pursuant to Huffman v. Pursue, Ltd., 592 (1975) and to dismiss the plaintiff's complaint: (1) for its lack of federal court subject matter jurisdiction under the Eleventh Amendment, because

neither the State of Pennsylvania nor the State of Nevada has waived its Eleventh Amendment Constitutional Rights, and additionally; (2) on the separate and independant grounds of the Huffman Abstention Doctrine (Comity) enunciated by this Court; and additionally, (3) for failure to state a civil right cause of action under 42 U.S.C. Section 1983 and failure to establish subject matter jurisdiction in the federal cases. See the analysis in Dubinka v. Judges of the Superior Court 23 F3d 218 (April 8, 1994) (CA 9, 1994) footnote 11 on page 226 as to Reason (1) above, predicated upon the Eleventh Amendment and see pages 225-226 as to Reason (2) above as to this Court's Abstention Doctrine. See also the Supplemental Brief in Henderson, Nevada Petition in 94-662 at Appendix 2 to this Amicus Curiae Brief.

The question which is proposed by Petitioners O'Neill/Goodman Review:

QUESTION PRESENTED FOR REVIEW

> Did the Federal District Court abuse its discretion in declining to abstain on the basis of the Younger v. Harris doctrine, where Petitioners' Complaint under 42 U.S.C. Section 1983 was brought at a time when there was no state prosecution or other activity outstanding against the Petitioners; and the Petitioners had voluntarily appeared before a City agency for the sole remedial purpose of requesting the agency withdraw its unlawfully obtained jurisdiction over them; and where Petitioners did not take an appeal from the adverse order of the agency through the state court system, but rather commenced this suit in the Federal District Court of the Eastern District of Pennsylvania?

is flawed in that, where, as here, the trial facts in O'Neill/Goodman show that Huffman is applicable, the district court judge has no discretion to act and must dismiss the complaint for lack of subject matter jurisdiction; i.e., the subject matter is the State initiated application of new "Legislation" directly relating to the (10th and 11th Amendment) powers of the Sovereign State of Pennsylvania. Absent "extraordinary circumstances," whenever a Sovereign State asserts its Tenth and Eleventh Amendment powers, any challenge to the "correctness" of state law enforcement action, involving the

application of newly encated state legislation in connection with a commenced state quasi-judicial administrative adjudication (with right to state court judicial review), must be brought in the State Court, so that the State Court may properly interpret the meaning of the new state law. See Watson v. Buck, 313 U.S. 367 (1941) as cited in 420 Huffman v. Pursue, Ltd., at page 600 footnote 14. The Eleventh Amendment was specifically adopted by the States (1792) to forbid the use of the federal court system as the petitioners have attempted to do in the O'Neill/Goodman Petition in 94-982 and in the Henderson Petition in 94-662, and is the foundation for this Courts decision in Huffman v. Pursue, Ltd., supra, and the Huffman Abstention doctrine which requires a dismissal of the federal complaint, for lack of federal subject matter jurisdiction.

The question which is before this Court is a "live" "Substantial Federal Question." Guidance from this Court is needed in order to protect the essential Constitutional rights

governing the orderly administration of State governmental powers, raised by the O'Neill/Goodman and in the City of Henderson Petitions, which are also involved in other important pending litigation. For example, California Attorney General Daniel Lungren has recently raised a defense to the maintenance of several current federal civil rights actions in the State of California which are presently challenging Prop. 187 (involving defenses to federal action which are identical to those presented in O'Neill/Goodman and the City of Henderson cases). See the Los Angeles Times News Articles dated January 29th, Janaury 31st and February 4th, appearing in Appendix 1 at page H-1 thru H-3 and Appendix 3 to this Amicus Curiae Brief at page 3-1.

A proper "substituted" Question for Review is:

QUESTION PRESENTED FOR REVIEW

"Does the Eleventh Amendment preclude the filing of the O'Neill/Goodman Civil Rights Action in the U.S. District Court for lack of federal subject matter jurisdiction."

ARGUMENT

Amicus contends that the exercise of Article III federal jurisdiction as to the Civil Rights Complaint in O'Neill/Goodman is barred for two separate and distinct reasons: FIRST, the primary (first principle), Eleventh Amendment right under the U.S. Constitution so commands, and SECOND, this Court's decisions (judgment and opinion) in the Civil proceedings entitled Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) as extended to Quasi-Judicial civil proceedings, see Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986) known as this Courts "Huffman Doctrine" and the doctrines of "res judicata" and "collateral estoppel" as applied to the parking tickets which were at issue in such quasi-judicial proceeding requires abstention (being a secondary, corollary right arising out of the Eleventh Amendment).

In this regard, the City of Henderson contends that one of the perquisites flowing

from state sovereignty and the Tenth and Eleventh Amendment is the right:

(1) to enact legislation on behalf of the state government;

(2) to have such newly enacted legislation interpreted for the first time by a state court which is charged with the duty to give such legislation a constitutional interpretation and save such legislation where possible, Watson v. Buck, 313 U.S. 367 (1941) [especially where the state has initiated action under its state police power, and litigation has commenced under said legislation (in which a quasi-judicial administrative adjudication is subject to state court judicial review)]; and

(3) where possible, as where the Sovereign is a defendant in a Federal Court and files its own declaratory judgment action in the State Court [as was done in the Henderson, Nevada case, and as the California Attorney General has done in relation to Prop. 187 litigation], not to be burdened by the duplicate cost of litigation of the same issue

in two different courts. One positive advantage of this last perquisite, as stated, is that it assigns priorities and does away with multiple litigation and the confusion which is presently generated by civil rights activists in their so-called race to the Courtroom.

In four years of litigation, in Henderson, Nevada Petition in 94-662, Henderson, Nevada has continuously argued to this Court in 4 separate petitions that an "Eleventh Amendment" grounds is <u>different</u> from "Huffman Abstention" grounds in the following respect. Under the Eleventh Amendment challenge the U.S. District Court is barred from assuming jurisdiction of the federal complaint, because its Article III power i.e. "subject matter jurisdiction" is diminished by the provisions of the Eleventh Amendment, as in Henderson, Nevada Case No. 94-662, where, absent "extraordinary circumstance," a Sovereign State's right, under the Tenth and Eleventh Amendments, to license businesses and punish fraud, may not (wrongfully) be

interfered with, as did actually occur in the Henderson, Nevada Civil Rights Action filed in the U.S. District Court of Nevada. In O'Neill/Goodman (Case No. 94-982) the jurisdiction of the U.S. District Court in Philadelphia is similarly limited by the provisions of the Eleventh Amendment i.e., the right of the Sovereign State of Pennsylvania to both legislate and judicially interpret City Ordinances authorized by State Statutes (as to legislation and litigation involving parking ticket monetary penalties) which requires such litigation to be brought before its State Judiciary and which may not be interfered with where the State is unwilling to waive its Sovereign rights and defenses. See also Watson v. Buck 313 U.S. 367 (1941).

A motion to dismiss upon the mere assertion of a Huffman abstention defense without also asserting the Eleventh Amendment Challenge raises a different question; i.e. that is; whether the federal complaint must be dismissed because of the trial Court's judgment (i.e. conclusion) that the Huffman

abstention doctrine should be applied. The Federal Court may or may not have subject matter jurisdiction as a matter of law. As extended by this Court's holding in Ohio Civil Rights Commission v. Dayton Christian Schools, supra, re Quasi-Judicial proceedings, the Huffman abstention defense is predicated upon the assertion that such (concurrent) jurisdiction may or will interfere with the Sovereign's Right under the Tenth and Eleventh Amendment.

When either an Eleventh Amendment or Huffman abstention affirmative defense is properly raised by or on behalf of the Sovereign State, the only question before the district court on the jurisdictional issue is whether the legistation under attack is unconstitutional in every sentence, clause, phrase, etc., so that no judicial interpretation can save it. Watson v. Buck, 313 U.S. 367 (1941). In the O'Neill/Goodman Civil Rights Action, plaintiffs' complaint has challenged the application of the City's ordinance to these defendants, and not the

ordinance on its face. The U.S. District Court therefore was required to dismiss the action on the mere assertion of the Huffman Abstention Doctrine, pursuant to this Courts prior decision in Watson v. Buck, supra. See also the analysis and decision of Dubinka v. Judges of the Superior Court, 23 F3d 222 (CA 9, 1994).

While it is true the Eleventh Amendment defense may be "waived", it was not waived in this case, in as much as the Huffman Abstention Doctrine itself is predicated upon the assertion of an Eleventh Amendment challenge. That affirmative defense was raised at the trial level and was wrongfully rejected by the trial judge. On appeal, the Court of Appeals had a duty and obligation to raise the Eleventh Amendment subject matter jurisdictional challenge, sui sponte, and did so.

At a bare minimum, the Huffman precedents which appear in the Federal Reporter system, customarily have evoked a ruling that the federal complaint was barred and must be

dismissed, as was the Ninth Circuit's final judgment on November 2, 1993 in the Henderson cross-appeal below in Nevada Entertainment Industry Inc. v. City of Henderson, 8 F3 1348 (1993). Without exception, the foundational Eleventh Amendment question is never discussed. See, however, the exception in World Famous Drinking Emporium v. City of Tempe, 820 F.2d 1079 (CA 9, 1987), at 1084. See, also, the scholarly observations of U.S. District Judge Wiseman in a series of five opinions over a three year period in Federal Express Corp. v. Tennessee Public Service Commission, etc., 693 F.Supp 598 (M.D. Tenn., 1988); 878 F.2d 381 (CA 6, 1989); 878 F.2d 1483 (CA 6, 1989); 738 F.Supp. 1140 (M.D. Tenn., 1990); and 925 F.2d 962 (CA 6, 1991).

Once the Tenth and Eleventh Amendment State's Police and judicial powers have been invoked (from "on-going" citations to quasi-judicial proceedings subject to judicial review), as in the O'Neill/Goodman Petition in 94-982, involving the assessment of parking fees in lieu of criminal prosecution which are

subject to review by the State's judicial powers including review within the quasi-judicial system:

(1) the federal court cannot exercise jurisdiction over the same subject matter without wresting control from the state by enjoining the state proceedings (as would be done in this case if allowed to continue). This, in effect, makes the State judicial system a "defendant" in the federal action -- a state's Sovereign Right to be free from such federal intrusion is the very reason the Eleventh Amendment was adopted!

(2) the federal courts cannot Constitutionally interfere with the State's on-going adjudication, unless the State's judicial system is shown to be "inadequate," and "a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary." [Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987), at 15]; and the federal plaintiff has the burden of proof in federal court of establishing that the state judicial

system will violate federal constitutional law.

(3) If the federal complaint contains no recited facts, which if proven, would show that the state judicial system is "inadequate," the federal plaintiff has not only failed to state a cause of action -- the federal plaintiff has also failed to file a complaint which invokes federal jurisdiction, and the federal complaint must be dismissed.

The Eleventh Amendment forbids the filing of the O'Neill/Goodman Civil Rights Action in Federal Court. O'Neill and Goodman's civil right complaint is not, and as a matter of law, cannot be what Petitioners represent it to be: an "independent civil rights action in the federal court which has been filed after the quasi-judicial proceedings have become final." As a matter of law, it is an action brought by a citizen of Pennsylvania in the federal court against the City of Philadelphia acting as the agent of the Sovereign State of Pennsylvania, which the Eleventh Amendment forbids, which collaterally attacks a

quasi-judicial adjudication of the City of Philadelphia for actions taken by it, acting as an agent for the Sovereign State of Pennsylvania, in a pending quasi-judicial traffic violation proceeding within the Pennsylvania State Judicial System, seeking a civil adjudication that its traffic laws as applied are unconstitutional (which is the equivalent of and as objectionable as a declaration judgment or injunction). As such, the filing of the Federal Civil Rights Complaint, the federal trial below, and this appeal to the Court of Appeal in the federal court are in direct conflict with and violate the Eleventh Amendment to the Federal Constitution and, preclude the Federal Court from assuming "subject matter jurisdiction" of that cause of action under its Article III Powers. In Welch v. State Dept. of Highway and Public Transportation et al., 483 U.S. 468, at 472; 97 L.Ed.2 389, at 395 Justice Powell writing the plurality opinion for 4 justices held:

The Eleventh Amendment provides:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.:

The Court has recognized that the significance of the Amendment 'lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III' of the Constitution. Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 98, 79 L.Ed.2d 67, 104 S.Ct. 900 (1984) (Pennhurst II). Accordingly, as discussed more fully in Part V of this opinion, the Court long ago held that the Eleventh Amendment bars a citizen from bring suit against the citizen's own State in federal court, even though the express terms of the Amendment refer only to suits by citizens of another State. Hans v. Louisiana, 134 U.S. 1, 10, 33 L.Ed. 842, 10 S.Ct. 504 (1890). See Edelman v. Jordan, 415 U.S. 651, 662-663, 39 L.Ed.2d 662, 94 S.Ct. 1347 (1974); Employees v. Missouri Dept. of Public Health and Welfare, 411 U.S. 279, 280, 36 L.Ed.2d 251, 93 S.Ct. 1614 (1973). For the same reason, the Court has held that the Amendment bars suits in admiralty against the States, even though such suits are not, strictly speaking, 'suits in law or equity.' Ex parte New York, No. 1, 256 U.S. 490, 497, 65 L.Ed. 1057, 41 S.Ct. 588 (1921) (Eleventh Amendment bars in personam actions against a State by its citizens); Ex parte New York, No. 2, 256 U.S. 503, 65 L.Ed. 1063, 41 S.Ct. 592 (1921) (Eleventh Amendment bars actions in rem against vessel owned by the State and employed exclusively for governmental purposes). See Florida Dept. of State v. Treasure Salvors, Inc., 458 U.S. 670, 683, n 17, 73 L.Ed.2d 1057, 102 S.Ct. 3304 (1982) (plurality opinion

of Stevens, J.); id., at 706-710, 73 L.Ed.2d 1057, 102 S.Ct. 3304 (White, J., concurring in judgment in part and dissenting in part)."

See also the annotation "Supreme Court's Construction of Eleventh Amendment, Restricting Federal Judicial Power over suits against States," 106 L.Ed.2d 660 at 677:

> "the following Supreme Court decisions have expressly recognized that the Federal Constitution's Eleventh Amendment is not limited in its application to suits against a state as a named defendant, but rather that <u>its application should be determined by the essential nature and effect of the suit in question</u>: Poindexter v. Greenhow (1884) 114 US 270, 29 L Ed 185, 5 S Ct 903; Re Ayers (1887) 123 US 443, 31 L.Ed. 216, 8 S Ct 164; Pennoyer v. McConnaughy (1891) 140 US 1, 35 L Ed 363, 11 S Ct 699; Hopkins v. Clemson Agricultural College (1911) 221 US 636, 55 L Ed 890, 31 S Ct 654; Ex parte New York (1921) 256 US 490, 65 L Ed 1057, 41 S Ct 588; Principality of Monaco v. Mississippi (1934) 292 US 313, 78 L Ed 1282, 54 S Ct 745; Worcester County Trust Co. v. Riley (1937) 302 US 292, 82 L Ed 268, 58 S Ct 185; and Scheuer v. Rhodes (1974) 416 US 232, 40 L Ed 2d 90, 94 S Ct 1683, 71 Ohio Ops 2d 474.
>
> It was observed by the Supreme Court in Poindexter v. Greenhow (1884) 114 US 270, 29 L Ed 185, 5 S Ct 903, infra section 15[c], that the question whether a suit is within the prohibition of the Eleventh Amendment

is not always determined by reference to the nominal parties on the record, and that the Eleventh Amendment is to be substantially applied in furtherance of its intention, and not evaded by technical and trivial subtleties.

The court in Re Ayers (1887) 123 US 433, 31 L Ed 216, 8 S Ct 164, infra section 15[b], also stating that the question whether a suit is within the prohibition of the Eleventh Amendment is not always determined by reference to the nominal parties on the record, added that such amendment's prohibition must be determined by a consideration of the nature of the case as presented on the record.

In Hopkins v. Clemson Agricultural College (1911) 221 US 636, 55 L Ed 890, 31 S Ct 654, the Supreme Court recognized that looking through form to substance, the Eleventh Amendment applies not only where the state is actually named as a party defendant on the record, but also where the proceeding, though nominally against an officer, is really against the state, or is one to which it is an indispensable party.

In Scheuer v. Rhodes (1974) 416 US 232, 40 L Ed 2d 90, 94 S Ct 1683 71 Ohio Ops 2d 474, infra section 22, which involved a federal civil rights action against a state governor and other state officials, the Supreme Court stated that it was well established that the Eleventh Amendment barred suits against the state not only when it was the named party, but also when it was the party in fact. The court noted that the applicability of the Eleventh Amendment was to be determined not by the mere names of the titular

parties, but by the essential nature and effect of the proceeding as it appeared from the entire record." (our emphasis).

A COMPARATIVE ARGUMENT IN RELATION TO: (1) THE "SIMILARITY" OF THE HENDERSON, NEVADA PETITION IN 94-662 AND (2) THIS COURT'S PRACTICE TO RETAIN "IMPORTANT SIMILAR ISSUES ALREADY PENDING BEFORE THE SUPREME COURT."

(See Petition for Rehearing at Appendix 1, page 1-20)

(A) STATEMENT OF THE (CITY OF HENDERSON) CASE.

In quasi-judicial administrative proceedings, the City of Henderson City Council determined that the Federal Plaintiffs and Respondents herein had committed fraud in applying for a revenue-based business license, and issued an order revoking their business license. [A business license will not issue unless the intended business operation is located in a proper zone.] See, in this regard, City of Las Vegas v. Nevada Industries, 772 P.2d 1275, at 1277. Rather than appeal the City's action within the state court judicial system, as provided for by

State law and municipal ordinance [see City of Henderson Municipal Code (hereinafter "H.M.C.") Section 4.06.160, the Respondents filed a 42 U.S.C. Section 1983 civil rights action in the United States District Court for the District of Nevada during the pendency of the state license revocation enforcement proceedings, seeking an injunction which would nullify the City Council's Order.

The federal civil rights action was initiated by the Respondents as a defense to the ongoing state license revocation enforcement proceedings. (A classic "Huffman Abstention" fact situation). The case is before this Court for review in the Henderson, Nevada Petition in 94-662, in a petition for a rehearing (see Appendix 1 to this Amicus Curiae Brief) on both the "subject matter jurisdiction" issue and the concomitant res judicata and collateral estoppel questions.

On November 2, 1993, the Ninth Circuit Court of Appeals [Browning and

Canby, Circuit Judges, Kelleher, Senior District Judge] filed its opinion in Nevada Entertainment Industries, Inc. et al. v. City of Henderson, 8 F.3d 1348 (argued and submitted May 10, 1993 and decided November 2, 1993) in which it awarded judgment to the City on its cross-appeal. The City of Henderson's cross-appeal had argued: (1) that the United States Supreme Court's opinions in Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) and Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986) controlled the disposition of the cross-appeal; and (2) that the Younger-Huffman abstention doctrine was predicated upon the 200 year old Eleventh Amendment and Anti-Injunction Statute, which required a dismissal for lack of "subject matter jurisdiction" and vacation of the District Court's Injunction of 4-years duration which had wrongfully prevented the City Council's quasi-judicial order of license revocation from being implemented. See

Petition for Writ of Mandamus (or Certiorari under Rule 11) in Case No. 93-1969 at pages 21 thru 65 at Appendix 17 to this Petition for Writ of Certiorari.

However, on April 7, 1994, the Nevada Entertainment Industries panel withdrew its November 2, 1993 opinion upholding Huffman-Younger abstention, and on May 4, 1994, filed a memorandum decision holding the Younger abstention issue to be moot!

In its Petition for Writ of Certiorari, in the Henderson, Nevada Petition in 94-662, the City of Henderson contends that the Court's actions on April 7 and May 4 constitute a violation of the sovereign right of the State of Nevada under the Eleventh Amendment and a usurpation of judicial power, and are void.

Recent decisions of the Ninth Circuit underscore the immediate need for this Court to undertake a definitive analysis of the meaning of Huffman-Younger

abstention, and resolve the present split of authorities for the future guidance of all federal trial courts.

(B) COMPARATIVE ARGUMENT IN RELATION TO HENDERSON, NEVADA PETITION IN 94-662.

(1) THIS COURT'S DECISIONS IN WATSON V. BUCK, HUFFMAN V. PURSUE, LTD., AND UNIVERSITY OF TENNESSEE V. ELLIOTT, ARE DISPOSITIVE OF THE QUESTIONS PRESENTED BY THIS PETITION.

Twenty years ago, Appellant in Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), contended in Appellant Huffman's Jurisdictional Statement, Opening Brief, at oral argument, and in a Petition for a Rehearing (see 421 U.S. 971), that in a 42 U.S.C. section 1983 action involving what constitutes a "collateral attack" against a "pending" state decision or order, the "jurisdiction" question (over the "res" subject matter) must first be addressed by the Federal Court, even before a resolution of any question as to any extension of the Younger abstention doctrine in Younger v. Harris, 401 U.S. 37 (1971) to civil cases.

Huffman arose as an attack against a state court's order determining the existence of a public nuisance and involved the use of real property. This type of action was regarded at common law as "in rem," where jurisdiction over the subject matter of the action (the real property or the "res") could only be before one court at a time. See Toucey v. New York Life Ins., Co., 314 U.S. 118, 86 L.3d 100 (1941). Following Toucey, supra, Congress enacted the anti-injunction statute in its present form. Thereafter, this Court again had occasion to consider the "in rem" exception in Donovan v. Dallas, 377 U.S. 408, 12 L.Ed.2 409, 84 S.Ct. 1579 (June 8, 1964). There, Justice Black, speaking for six members of the court, acknowledged the continued vitality of that exception at page 412:

> "Early in the history of our country a general rule was established that state and federal courts would not interfere with or try to restrain each other's proceedings. That rule has continued substantially unchanged to this time. An exception has been made in cases where a court has custody of property, that is, proceedings in rem or quasi in rem. In

> such cases this Court has said that the state of federal court having custody of such property has exclusive jurisdiction to proceed. Princess Lida of Thurn v. Thompson, 305 U.S. 456, 465-468, 83 L.Ed. 285, 290-292, 59 S.Ct. 275.

Nothing in existing case law contradicts this basic rule on jurisdictional power. As recently as Mitchum v. Foster, 407 U.S. 225, 32 L.Ed.2 705, 92 S.Ct. 2151 (June 19, 1972) this Court acknowledged this "in rem" exception to the blanket prohibition of the anti-injunction statute, at page 713:

> 'In addition to the exceptions to the anti-injunction statute found to be embodied in these various Acts of Congress, the Court recognized other "implied" exceptions to the blanket prohibition of the anti-injunction statute, to enjoin a state court proceeding in order to protect its jurisdiction of a res over which it had first acquired jurisdiction. (See e.g., Toucey v. New York Life Ins. Co., 314 U.S., at 135-136, 86 L.Ed. at 105, 106, 137 A.L.R. 967; Freeman v. Howe, 24 How 450, 16 L.Ed. 749; Kline v. Burke Construction Co., 250 U.S. 226, 67 L.Ed. 226, 43 S.Ct. 79, 24 A.L.R. 1077.)'

and, after a historical discussion of Toucey v. New York Life Ins. Co., supra, concluded at page 714:

> '. . . The congressional response to Toucey was the enactment in 1948 of the anti-injunction statute in its present form in 28 USC Sect. 2283...to "restore the basic law as generally understood and interpreted prior to the Toucey decision..."'

The infirmities noted above, being apparent on the face of the complaint as

filed, the federal court should have dismissed the federal action for lack of jurisdiction.

On appeal, Appellant's primary argument had been that the trial court lacked "subject matter jurisdiction" of the federal civil rights action which was filed on December 1, 1972, inasmuch as a final judgment of abatement of the public nuisance involved had been entered in the State Court on the previous day, November 30, 1972, and the state action and "res" was still "pending" in the state court for post-trial motions, and until the appeal period had expired.

Justice Rehnquist's majority opinion in Huffman did not address the controlling United States Supreme Court lack of "subject matter jurisdiction" precedents which had been cited by Huffman regarding the "res" jurisdiction issue. Instead, his opinion decided the case solely on the basis of the Younger issue, without ruling explicitly whether Younger was jurisdictional. However, his opinion remanded the case to the federal trial court

for a determination as to whether "the District Court may assume jurisdiction under an exception to the policy against federal judicial interference with state court proceedings of this kind" (our emphasis). See Huffman at 420 U.S. 612. That ambiguity generated a dissent by Justices Brennan, Douglas, and Marshall, see Huffman at 420 U.S. 613, fn. 1, which drew into question whether Younger v. Harris abstention was jurisdictional.

As the only member participating in the Huffman v. Pursue, Ltd., oral arguments now setting on this Court, Chief Justice Rehnquist will recall that, during oral argument, Huffman replied to Justice Stewart's Query (as to whether Huffman would be satisfied if the Younger abstention decision were to be expanded to civil cases including Huffman v. Pursue, Ltd.,) that he would not, because the first question which the Court must answer was whether on the date the civil right action was filed, the Three-Judge District Court had "subject matter

jurisdiction" to consider the civil right action, which it did not have under the Toucey case. It must necessarially follow therefore that the Huffman case was predicated upon lack of subject matter jurisdiction, or else the High Court would have been required to apply Toucey and hold the federal court did not have subject matter jurisdiction or distinguish that binding precedent. Realizing that the District Court lacked subject matter jurisdiction, the Court could under its appellate authority remand the case for application of the new test to avoid a constitutional conflict with the Eleventh Amendment and "res" exception.

While Justice Rehnquist's majority opinion avoided addressing Appellant Huffman's primary lack of "subject matter jurisdiction" contention, it further confused the issue by emphasizing the fact that the Huffman Court was not suggesting "that the normal rules of res judicata and judicial estoppel do not operate to bar relitigation in actions under 42 U.S.C. section 1983 of federal issues

arising in state court proceedings...Our assumption is made solely as a means of disposing of appellee's contentions without confronting issues which have not been briefed or argued in this case." See Huffman, at 420 U.S. 606, fn.18. The confusion which was caused required Prosecutor Huffman to file a petition for rehearing which, unfortunately, was denied without resolution of the "subject matter jurisdiction" and Eleventh Amendment issues. See copy of the Huffman Petition for Rehearing to this Amicus Curiae Brief at Appendix G-1 thru G-39 to the Petition for Rehearing in Henderson, Nevada Petition in 94-662 which appears at Appendix 2 to this Amicus Curiae Brief.

Amicus Curiae submits the Statement of Chief Justice Rehnquist in Ohio Civil Rights Commission v. Dayton School, 477 U.S. 619 at L 26 that:

> "We think, however, that this argument misconceives the nature of Younger abstention. It does not arise from lack of jurisdiction in the District court, but from strong polices counseling against the exercise of such jurisdiction where particular kinds of state

> proceedings have already been commenced. A State may of course voluntarily submit to federal jurisdiction even though it might have had a tenable claim for abstention. See Brown v. Hotel Employees, 468 US 491, 500, n 9, 82 L.Ed 2d 373, 104 S Ct 3179 (1984); Ohio Bureau of Employment Services v. Hodory, 431 US 471, 479-480, 52 L Ed 2d 513, 97 S Ct 1898 (1977); Sosna v. Iowa, 419 US 393, 396-397, n 3, 42 L Ed 2d 532, 95 S Ct 553 (1975). But in each of these cases the State expressly urged this Court or the District Court to proceed to an adjudication of the constitutional merits. We think there was no similar consent or waiver here, and we therefore address the issue of whether the District Court should have abstained from deciding the case."

does not resolve the above issue and does not apply where the State of Nevada and State of Pennsylvania do not waive their primary Eleventh Amendment Sovereign rights. See Argument, supra, at p. 23 et seq.

Questions 1 and 2 of the Henderson, Nevada Petition in 94-662 raise the same two issues of "lack of subject matter jurisdiction" and "estoppel" and "collateral estoppel" which were discussed in Huffman, in the light of the Huffman background (a "pending" state action). The trial court record below and Petition herein place before

this Court the identical lack of "subject matter jurisdiction" issue which was argued in Huffman and, in addition, the "res judicata/collateral estoppel" question which was discussed by Justice Rehnquist, but was not then before the Huffman Court for decision. Petitioner contends that in the intervening twenty years, the lack of "subject matter jurisdiction" basis of Huffman has been clearly established and the "res judicata/collateral estoppel" issues which were presented below has been firmly resolved in University of Tennessee v. Elliott, 478 U.S. 788 (1986).

To the extent that the Respondents civil rights action in the Henderson, Nevada Petition in 94-662 attempts an attack upon the "new, comprehensive municipal zoning code and municipal license code" enacted in 1989, such is barred by the abstention doctrine expressed in Watson v. Buck, 313 U.S. 387 (1941) and the federal right of a state to have newly enacted legislation on important state issues, containing a severability clause, construed initially by the state court system. [See

Huffman v. Pursue, Ltd., supra, at fn. 14 for reference to Watson v. Buck principle.]

Respondents request for a restraining order and a temporary injunction in Henderson, Nevada Petition in 94-662 should have been denied, and the civil rights complaint should have been dismissed at the outset on the City Attorney's reliance on the "clean hands" doctrine that a Court of Equity has no jurisdiction to issue relief to a person who comes into court with dirty hands (a quasi-judicial finding of fraud). Further, on said Petition, the Ninth Circuit is bound by its prior findings of fact and conclusions of law in its Opinion and Judgment filed on November 2, 1993 which, although withdrawn, are still undisturbed and recite that the trial facts are controlled by this Court's ruling in Huffman v. Pursue, Ltd., supra, as explicated by its ruling in Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., supra, and its dicta in New Orleans Public Serv., Inc. v. City Council of New Orleans, 491 U.S. 350 (1989).

In comparing the two cases, it should be noted that the Henderson, Nevada record clearly establishes: (1) the Henderson quasi-judicial license revocation hearing was and is still "pending" before the City Council and had not been terminated when Nevada Enterprises filed its federal complaint on April 24, 1990; and (2) it clearly was, therefore, a "closed question," which had been answered eight years earlier by this Court's 1986 decision in Dayton Christian School (as the Ninth Circuit's opinion in 8 F.3d 1348 so held) and was not an "open question."

On the other hand, the final judgment in O'Neill v. City of Philadelphia, 32 F.3d 725 (Aug. 5, 1994), petition for writ of certiorari filed in this Court on November 30, 1994, as 94-982, contains rulings on several quasi-judicial proceedings, some in which the state quasi-judicial hearing was "pending" and thus was a "closed question" which has been decided in Dayton Christian Schools, and others in which the state hearing had been terminated and theoretically, under this

Court's Abstention decision was an "open question." See page 746. The majority opinion of Judges Garth and Roth, and the dissenting opinion of Judge Lewis in the O'Neill case are realistic examples of the conflict which exists on the Ninth Circuit of 38 justices -- yet neither opinion addresses the fundamental question relating to the "first principle," Eleventh Amendment "sovereign right" of each State, as a Sovereign, herein claimed by the State of Nevada. Had those justices been required to consider and apply the primary Eleventh Amendment right of the State of Pennsylvania, they would have been able to agree unanimously on the judgment of the majority-but for a different reason.

In as much as the petition herein in O'Neill and Goodman Case No. 94-982 is confined to those cases which had become final in the administrative proceedings or upon which the petitioners claimed they had not subjected themselves to the jurisidiction of the Court, the position of Amicus Henderson,

Nevada's is the same in both cases that the Eleventh Amendment Challenge is a bar to all of their claims.

CONCLUSION

Amicus Henderson, Nevada submits that this Court should conform its prior order in Henderson, Nevada Petition in 94-662 dated January 9, 1995 and bring it into agreement with the declared public policy which Congress considered and approved in principle in 1976, by confirming the right of the State of Nevada [and other States, such as California and Pennsylvania] who are engaged in the same type of Eleventh Amendment litigation, to an obligatory judicial review by this Court as to the Eleventh Amendment "subject matter jurisdiction" questions. See Appendix 1.

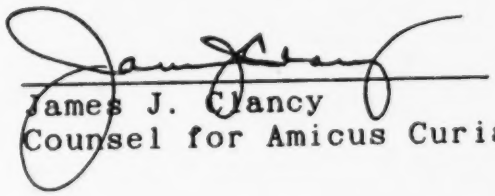
Accordingly, the State of Nevada prays that a new and different order be entered requiring the following disposition:

> that the State of Nevada petition for writ of certiorari be granted and the cause set for argument on the subject matter jurisdictional issue [which was raised but left unanswered in the appellate proceedings which were conducted in Huffman v. Pursue, Ltd., 420

U.S. 592 (1975)], to be heard in tandem with the jurisdictional issue raised in O'Neill v. City of Philadlephia et al., 94-982, both of which involve Eleventh Amendment and Huffman abstention considerations. See Supreme Court Practice, 7th Ed., by Stern, Gressman, Shapiro and Geller, at Section 4.16, "Important Similar Issues Already Pending Before the Supreme Court, at pages 192-193."

Dated: February 6, 1995

Respectfully Submitted,



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